Killion v. Nester et al Doc. 12

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

ANTOINE D. KILLION,	)	
#42054-177	)	
	)	
Plaintiff,	)	
	)	**Case No. 17-cv–322-JPG**
vs.	)	
	)	
GREG NESTER,	)	
MADELYN DALEY,	)	
OFFICER JENKS,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

GILBERT, District Judge:

Plaintiff, Antoine D. Killion, filed this *pro se* civil rights action pursuant to 42 U.S.C. § 1983 while he was incarcerated at Big Muddy Correctional Center. Plaintiff has since been released on parole. In his First Amended Complaint (Doc. 8), Plaintiff alleges Greg Nester and Madelyn Daley, both employed by the Public Defender's Office in St. Clair County, Illinois provided ineffective assistance of counsel in relation to Plaintiff's criminal case. Additionally, Plaintiff alleges that Officer Jenks violated his constitutional rights by delaying the filing of Plaintiff's ineffective assistance of counsel motion. In connection with these claims, Plaintiff seeks monetary damages.

This case is now before the Court for a preliminary review of the First Amended Complaint (Doc. 8) pursuant to 28 U.S.C. § 1915A, which provides:

> (a) **Screening** – The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a

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prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

(b) **Grounds for Dismissal** – On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint–

(1) is frivolous, malicious, or fails to state a claim on which relief may be granted; or

(2) seeks monetary relief from a defendant who is immune from such relief.

An action or claim is frivolous if "it lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Frivolousness is an objective standard that refers to a claim that any reasonable person would find meritless. *Lee v. Clinton*, 209 F.3d 1025, 1026-27 (7th Cir. 2000). An action fails to state a claim upon which relief can be granted if it does not plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The claim of entitlement to relief must cross "the line between possibility and plausibility." *Id*. at 557. At this juncture, the factual allegations of the *pro se* complaint are to be liberally construed. *See Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 821 (7th Cir. 2009).

This action does not survive preliminary review under the above standard.

First Amended Complaint

In June 2015, Plaintiff was charged with multiple counts of aggravated battery. *See* St. Clair County Case No. 15–CF–736 (*Illinois v. Killion*). The First Amended Complaint indicates that, after a bench trial, Plaintiff was found guilty and was sentenced on February 8, 2016. (Doc. 8, pp. 6-10). Assistant Public Defender Nester served as Plaintiff's counsel through the sentencing hearing on February 8, 2016. (Doc. 8, pp. 1, 6-10). Plaintiff contends that Nester provided him with ineffective assistance of counsel. (Doc. 8, pp. 6-10). Specifically, Plaintiff contends Nester failed to request a hearing on a video recording used as evidence in Plaintiff's

case (Doc. 8, p. 8); failed to request a preliminary hearing on other matters (Doc. 8, pp. 8, 10); forced Plaintiff to agree to a bench trial (Doc. 8, p. 10); and mishandled Plaintiff's sentencing hearing (Doc. 8, pp. 8, 10).

Plaintiff's sentencing hearing was held on February 8, 2016. (Doc. 8, p. 6). Prior to the sentencing hearing, Plaintiff gave Officer Jenks, the officer responsible for transporting Plaintiff, an ineffective assistance of counsel motion. *Id.* The motion objected to Nester's handling of Plaintiff's case. *Id.* Plaintiff expected the motion to be filed and heard before the sentencing. *Id.* The motion was not filed or heard. *Id.* On February 11, 2016, after Plaintiff was sentenced, Officer Jenks returned the motion to Plaintiff with a "sticky" note that read: "You want this filed right?" Officer Jenks told Plaintiff that Nester had taken the motion off of Officer Jenks' desk, but the motion was never filed. *Id.* Plaintiff wrote a second ineffective assistance of counsel motion and mailed the motion to the court (attaching the unfiled motion as an exhibit). *Id.*

On April 7, 2016, a hearing was held on Plaintiff's ineffective assistance of counsel motion. *Id.* The court concluded that Plaintiff's claims were unfounded. *Id.* Nevertheless, the court directed Nester "to tell the head public defender John O' Gara to switch public defenders." *Id.* Thereafter, Madelyn Daley, an assistant public offender, was appointed to handle Plaintiff's post-trial matters, including representing Plaintiff at his motion to reconsider sentencing. *Id.*

Plaintiff also contends that Daley provided him with ineffective assistance of counsel. (Doc. 8, pp. 6-9). Plaintiff contends that Daley failed to consult with him prior to his hearing on the motion to reconsider sentencing and otherwise mishandled the hearing. (Doc. 8, pp. 6-9).

Additionally, Plaintiff contends that Daley failed to follow *Krankel* procedure[1] in relation to his ineffective assistance of counsel claims directed against Nester. (Doc. 8, p. 8).

Finally, in his request for relief, Plaintiff suggests that Daley and Nester's allegedly ineffective counsel somehow interfered with Plaintiff's ability to attend court hearings pertaining to the dissolution of his marriage and prevented him from obtaining a fair result in that case. (Doc. 8, p. 11).

In connection with these claims, Plaintiff seeks monetary damages. *Id.*

Discussion

The Court finds it convenient to divide the *pro se* action into two counts. The parties and the Court will use these designations in all future pleadings and orders, unless otherwise directed by a judicial officer of this Court. Any other claim that is mentioned in the Complaint but not addressed in this Order should be considered dismissed without prejudice as inadequately pled under the *Twombly* pleading standard.

Count 1 – Constitutional claims against Daley and Nester arising from the ineffective assistance of counsel in connection with Plaintiff's St. Clair County criminal proceeding.

Count 2 – First and/or Fourteenth Amendment access to the courts claim against Jenks.

[1] Under *People v. Krankel*, 102 Ill.2d 181 (1984), and its progeny, when a defendant alleges a posttrial *pro se* claim of ineffective assistance of counsel, the trial court examines the factual basis underlying the defendant's claim. *People v. Demus*, 47 N.E.3d 596, 603 (Ill. App. Ct. 2016). The trial court then determines whether to appoint new counsel. *Id.* at 604-05. After the preliminary inquiry, "[i]f the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the pro se motion. However, if the allegations show possible neglect of the case, new counsel should be appointed." *People v. Moore*, 797 N.E.2d 631, 637 (Ill. 2003). The newly appointed counsel is then responsible for representing the defendant at the hearing on the defendant's *pro se* claim of ineffective assistance. *Id.*

Count 1

The Court need not evaluate Plaintiff's constitutional claims as to Daley and Nester. This is because, regardless of the constitutional basis for Plaintiff's claims, no recovery may be had against either Defendant. To state a civil rights claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988). Conversely, a plaintiff cannot proceed with a federal claim under § 1983 against a non-state actor. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999); *Gayman v. Principal Fin. Servs., Inc.*, 311 F.3d 851, 852-53 (7th Cir. 2003). In *Polk County v. Dodson*, 454 U.S. 312 (1981), the Supreme Court held that a court-appointed attorney, even if employed by the state, may not be sued under 42 U.S.C. § 1983 for legal malpractice, because such an attorney does not act "under color of state law." *Id*. at 324-25. *See also Sceifers v. Trigg*, 46 F.3d 701, 704 (7th Cir. 1995). While Plaintiff in the case at bar does not label his claims against Nester and Daley as "legal malpractice" claims, the same principle applies here. Nester and Daley, as Plaintiff's court-appointed public defenders, are not state actors who are amenable to suit in a § 1983 civil rights case. Accordingly, Plaintiff may not maintain any claim against either Defendant. Count 1 shall be dismissed with prejudice.

Count 2

As to Officer Jenks, the First Amended Complaint suggests that – at most – Jenks may have contributed to a delay in filing Plaintiff's written motion for ineffective assistance of counsel. The First Amended Complaint does not indicate that the alleged delay caused Plaintiff to suffer any actual or potential detriment to his ability to pursue a meritorious claim in court. First, Plaintiff was not required to file a written motion to object to Nester's representation of

him. In Illinois, all that is necessary is for the defendant to bring the claim to the trial court's attention, and thus, Plaintiff could have raised the claim orally at the sentencing hearing.[2] Second, the ineffective assistance of counsel motion was eventually heard, Plaintiff received new counsel, and a new sentencing hearing.

Actual or threatened detriment is an essential element of a § 1983 action for denial of access to the courts. *Howland v. Kilquist*, 833 F.2d 639, 642–43 (7th Cir.1987); *Hossman v. Sprandlin*, 812 F.2d 1019, 1021–22 (7th Cir. 1987). An inmate has no constitutional claim unless he can demonstrate that a non-frivolous legal claim has been frustrated or impeded. *Lewis v. Casey*, 518 U.S. 343, 352–53 (1996). A delay in filing such as Plaintiff describes is not, in and of itself, a detriment of constitutional proportions. *Kincaid v. Vail*, 969 F.2d 594, 603 (7th Cir.1992), cert. denied, 506 U.S. 1062 (1993). Therefore, Plaintiff's access to the court's claim, Count 2, shall be dismissed with prejudice.

Pending Motions

Plaintiff has filed a Motion to Appoint Counsel (Doc. 3) and a Motion for Recruitment of Counsel (Doc. 9). Both motions indicate that Plaintiff has not made an attempt to obtain representation on his own.

A district court "may request an attorney to represent any person unable to afford counsel." 28 U.S.C. § 1915(e)(1). There is no constitutional or statutory right to counsel for a civil litigant, however. *Stroe v. Immigration and Naturalization Services*, 256 F.3d 498, 500 (7th Cir. 2001); *Zarnes v. Rhodes*, 64 F.3d 285, 288 (7th Cir. 1995). Recruitment of counsel lies within the sound discretion of the trial court. *See Pruitt v. Mote*, 503 F.3d 647, 654 (7th Cir. 2007) (citing *Johnson v. Doughty*, 433 F.3d 1001, 1006 (7th Cir. 2006)).

[2] *People v. Ayres*, 2017 IL 120071, ¶ 11, reh'g denied (May 22, 2017).

In determining whether to recruit counsel, the Court is directed to make a two-fold inquiry: "(1) has the indigent plaintiff made a reasonable attempt to obtain counsel or been effectively precluded from doing so; and if so, (2) given the difficulty of the case, does the plaintiff appear competent to litigate it himself?" *Pruitt*, 503 F.3d at 654 (citing *Farmer v. Haas*, 990 F.2d 319, 321-22 (7th Cir. 1993)). The first prong of the analysis is a threshold question. If a plaintiff has made no attempt to obtain counsel on his own, the court should deny the request. *See Pruitt*, 503 F.3d at 655.

Plaintiff satisfies neither requirement. He disclosed no efforts to secure counsel on his own before seeking the Court's assistance in doing so. Further, he evinces an ability to competently litigate this straightforward matter without the assistance of counsel, despite the fact that he alleges he does not "know what [he] is doing." (Doc. 9, p. 2). The pending motions are therefore **DENIED.**

Disposition

IT IS HEREBY ORDERED that **COUNT 1** is **DISMISSED** with prejudice as legally frivolous because Daley and Nester are not state actors and thus are not amenable to suit under § 1983.

IT IS FURTHER ORDERED that **COUNT 2** is **DISMISSED** with prejudice for failure to state a claim upon which relief can be granted.

IT IS FURTHER ORDERED that the entire action is **DISMISSED** with prejudice.

IT IS FURTHER ORDERED that the Motion to Appoint Counsel (Doc. 3) and a Motion for Recruitment of Counsel (Doc. 9) are **DENIED**.

Plaintiff is **ADVISED** that this dismissal shall count as one of his allotted "strikes" under the provisions of 28 U.S.C. § 1915(g). Plaintiff's obligation to pay the filing fee for this action

was incurred at the time the action was filed, thus the filing fee remains due and payable. *See* 28 U.S.C. § 1915(b)(1); *Lucien v. Jockisch*, 133 F.3d 464, 467 (7th Cir. 1998).

If Plaintiff wishes to appeal this Order, he may file a notice of appeal with this Court within thirty (30) days of the entry of judgment. FED. R. CIV. P. 4(A)(4). If Plaintiff does choose to appeal, he will be liable for the $505.00 appellate filing fee irrespective of the outcome of the appeal. *See* FED. R. APP. P. 3(e); 28 U.S.C. § 1915(e)(2); *Ammons v. Gerlinger*, 547 F.3d 724, 725-26 (7th Cir. 2008); *Sloan v. Lesza*, 181 F.3d 857, 858-59 (7th Cir. 1999); *Lucien*, 133 F.3d at 467. Finally, if the appeal is found to be nonmeritorious, Plaintiff may also incur another "strike." A proper and timely motion filed pursuant to Federal Rule of Civil Procedure 59(e) may toll the 30-day appeal deadline. FED. R. APP. P. 4(a)(4). A Rule 59(e) motion must be filed no more than twenty-eight (28) days after the entry of the judgment, and this 28-day deadline cannot be extended.

The Clerk shall **CLOSE THIS CASE** and enter judgment accordingly.

IT IS SO ORDERED.

DATED: July 24, 2017

s/J. Phil Gilbert
J. PHIL GILBERT
United States District Judge